In the Supreme Court of the United States.

OCTOBER TERM, 1923.

PIEL BROS., APPELLANT,

v.

RALPH A. DAY, FEDERAL PROHIBITION Director for the State of New York; John Rafferty, Collector of Internal Revenue for the First District of New York, et al. } No. 95.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JAMES EVERARD'S BREWERIES, APPELLANT,

v.

RALPH A. DAY, PROHIBITION DIRECTOR OF New York, et al. } No. 200.

EDWARD AND JOHN BURKE (LIMITED), appellant,

v.

DAVID H. BLAIR, COMMISSIONER OF INternal Revenue, et al. } No. 245.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

88794—24——1

SUPPLEMENTAL BRIEF FOR APPELLEES.

The brief already filed by the Government in this case does not suggest, or at least adequately suggest, the view of the Eighteenth Amendment which, if sound, is fatal to the Appellants' contention in the instant cases.

Throughout all the briefs filed in these cases, there seems to be a confusion of terms with respect to "beverage" and "nonbeverage" liquors. In the former class are included intoxicating liquors which are sold and used merely for the pleasure of drinking, while in the latter class is included the use of the same intoxicating liquors when the object is not for the mere pleasure of drinking, but for some special purpose as, for example, either medicinal purposes or as a religious rite.

The Eighteenth Amendment does not, at least in terms, suggest any such distinction. Its first clause is a general prohibition of the manufacture and transportation of intoxicating liquors "for beverage purposes," and undoubtedly the common interpretation of those words means nothing more than for the purposes of drinking. Undoubtedly there are beverage and nonbeverage liquors. For example, pure alcohol or wood alcohol, while highly intoxicating, could not be called a "beverage," for they are not commonly taken as a drink and may not with safety be so used.

Again, there are many medicinal preparations which contain alcohol in sufficient quantities to be

intoxicating; but they are so prepared and medicated as to be unpalatable for beverage purposes.

The distinction between an intoxicating liquor that is not adaptable for the purpose of drinking and an intoxicating liquor that, in form and substance, is thus adaptable is a very clear one. It does not, however, depend upon the object of the drinker—however worthy and proper. The phraseology of the briefs filed in these cases, which persistently classifies distilled spirits, wines, and malted liquors as "nonbeverage" if the particular owner uses them for a special purpose, is not sound and is not justified by the plain language of the first section of the Eighteenth Amendment.

Did the Eighteenth Amendment, then, intend to prohibit certain uses of intoxicating liquors which are sanctioned by the laws of many prohibition States? If this were so, it is probable that the Eighteenth Amendment would not have been adopted. In my opinion, the answer is that the Eighteenth Amendment was intended to provide a general prohibition which, in itself and of its own vigor, would create no exceptions, but which, in the second clause, would leave to Congress the question of so enforcing the law as to permit certain special uses, which, by almost universal consent, were regarded as legitimate.

In other words, the question as to what exceptions could be made of certain specific purposes, which were not within the evil at which the Eighteenth Amendment was aimed, was left to the sound dis-

cretion of Congress. If this view be correct, there can be no question as to the power of Congress to determine, within its broad discretion, that malted liquors have so little therapeutic value that their use as medicine could not be sanctioned or, in any event, that if they have therapeutic value, yet such use would lead to abuses which would go far to destroy the Eighteenth Amendment.

The Eighteenth Amendment clearly indicates that the scope of the prohibition and the details of its enforcement were to be left to Congress. In a sense the Amendment does not act *in personam*. It does not say that a man may not drink intoxicating liquors. In a sense, it does not act even *in rem*, for it does not act *directly* upon the contraband merchandise. Its inhibition is directed to the facilities of manufacture and transportation. Undoubtedly its objective was to stop the habit of drinking intoxicating liquors in the United States, and it sought to accomplish this by cutting off the base of supplies. What was forbidden was the manufacture and transportation of intoxicating liquors for beverage purposes; but not only was the method of enforcement left to Congress, but even the definition of "intoxicating liquors" and of "beverage purposes" was not provided by the Constitution itself. The details of definition and enforcement were left primarily to Congress, under the second clause, and, ultimately, to the judiciary, for fair interpretation. Therefore the Amendment simply conferred upon the Federal Government power to prohibit the manufacture and transportation of intox-

icating liquors for beverage purposes, and the common and easily understood meaning of the word "beverage" was for the purpose of drinking. It sought to end what was regarded as a pernicious habit, and it did not undertake to define what was a legitimate permitted use of intoxicating liquors as a beverage and what was not. All this, following the whole scheme and phraseology of the Constitution, was left to the sound discretion of Congress, *within reasonable limits.*

The Amendment as proposed to the States was not a new expedient. Before Congress took this action the subject had been discussed for several generations and had resulted, in the States, in many Constitutional provisions and statutory laws.[1] Upon these had been built a very considerable superstructure of judicial construction.

Prior to the submission to the States of the Eighteenth Amendment there were already in the Constitutions of at least seventeen States a prohibition of intoxicating liquors. Some of these, as, for example, Arizona, simply prohibited intoxicating liquors, without any exception in favor of such permitted use for medicinal purposes. The Constitutions of other States, as, for example, Kansas, contained an express exception in favor of the manufacture and sale of

[1] An Appendix to this brief contains the Constitutional clauses of a number of States as they existed when the Eighteenth Amendment was proposed and ratified. While the list is not complete, it will give the Court a very fair idea of the character of the State amendments, which Congress presumably considered when it formulated the Eighteenth Amendment.

intoxicating liquors for medical, scientific, and mechanical purposes.

Of the first class, some of the absolute prohibitions were construed by the highest Courts of the respective States to permit, if the Legislature provided, the use of intoxicating liquors for specially permitted purposes; while in other States the absolute prohibition was construed, as in the case of Arizona, as outlawing the use of intoxicating liquors for any purpose—and the Legislature was powerless to create an exception.

Of the second class, it was held in some States (Kansas, for example) that while the Constitution thus expressly exempted from the prohibition of the statute the use of intoxicating liquors for certain special purposes, yet it was within the power of the Legislature, if it thought that such permitted uses conflicted with the enforcement of the general prohibition, to forbid them also.

In nearly all the instances, with few exceptions, the Legislatures of the various States, in enforcing the Constitutional prohibition, were given a reasonable discretion to determine under what special conditions and for what special purposes the use of intoxicating liquors should be permitted. Thus in twelve States (Arizona, Utah, Maine, New Mexico, North Dakota, Georgia, Kansas, Nebraska, North Carolina, Idaho, Washington, and West Virginia) no intoxicating liquors of any kind might be prescribed under the enforcing legislation; while in eleven States (Alabama, Arkansas, Delaware, Florida, In-

diana, Mississippi, Oklahoma, Oregon, South Caroline, Tennessee, and Texas) pure alcohol only could be prescribed.

In thirty-five States malt liquors were regarded, for the purpose of determining the question of permitted use for special purposes, as in a class by themselves, for of thirty-five States twelve forbade malted liquors, twelve forbade all intoxicating liquors, and eleven prohibited intoxicating liquors for medicinal purposes, with the exception that pure alcohol, which can not be described as a beverage, might be prescribed by physicians.

In all the cases where the medicinal use of intoxicating liquors was permitted there were the most minute and restrictive regulations of the right of either physician or druggist to prescribe.

The Court will find all these statutory provisions summarized in the brief of the nineteen Attorneys General, filed as *amici curiae* in the *Everard Breweries case* (No. 200).

While some of this legislation was subsequent to the Federal Prohibition Amendment, yet most of it antedated it. These Constitutional provisions and statutory laws had given rise to a great volume of decisions, some of which had reached this Court under the Fourteenth Amendment, and it had been uniformly held, both by the highest Courts of the States and this Court, that the power to regulate intoxicating liquors not only carried with it the power to proscribe intoxicating liquors, but, when necessary,

liquors which were similar in appearance to intoxicating liquors, but, in fact, not intoxicating at all.

Purity Extract Co. v. *Lynch*, 226 U. S. 192.
Ruppert v. *Caffey*, 251 U. S. 264.

In the latter case the Court will find, in the elaborate footnotes to the exhaustive opinion of Mr. Justice Brandeis, references to many of these Constitutional provisions and statutory laws.

All this body of Constitutional and statutory law and judicial decisions thereon was unquestionably before Congress when it drafted the Eighteenth Amendment. It was not building the foundations of a new public policy; it was only erecting a superstructure thereon.

Bearing this fact in mind, it is very significant that the Eighteenth Amendment made no exception in favor of the special use of intoxicating liquors, which many of the States had regarded as legitimate and not inconsistent with the main purpose of their prohibitory laws. Section 1 is a flat prohibition of the manufacture and transportation of "intoxicating liquors * * * for beverage purposes." It could not have been an oversight on the part of Congress in framing the proposed Amendment, when it failed to except the use of intoxicating liquors for industrial, medicinal, and sacramental purposes.

I do not contend that the Eighteenth Amendment was intended, by its own force, to forbid such permitted uses; but I do contend that the first and second sections of the Amendment should be read together and that they manifest a clear purpose, in

harmony with the policy of most of the States, to make a general prohibition of the manufacture and transportation of intoxicating liquors for beverage purposes, and then to leave to the discretion of the legislative body, *within reasonable limits*, what permitted uses could be recognized that would not be inconsistent with the *general* policy of prohibition.

Inasmuch as concurrent power of both State and Nation was clearly contemplated, it is a fair assumption that the Eighteenth Amendment was intended to harmonize with the general policy of the States. Moreover, the form and structure of the Eighteenth Amendment were to be in harmony with the Constitution in stating general principles, but leaving the details to legislative discretion. For example, the Amendment does not suggest any definition of "intoxicating liquors," and even experts might disagree as to what is, in a given case, such a liquor. Therefore, the second clause empowered Congress in enforcing the general policy of prohibition to determine what was an "intoxicating liquor."

Again, the prohibition of the Eighteenth Amendment extends to such liquors "for beverage purposes"; but again there is a failure to define what is a "beverage purpose," and again a broad discretion was vested in Congress to determine whether a special use for an intoxicating liquor, as, for example, for medicinal or sacramental purposes, was a "beverage purpose" within the meaning of the law.

Possibly the late Chief Justice White had this theory in mind when, in his concurring opinion in the

National Prohibition cases (253 U. S. 350, 390), he said:

> In the first place, it is indisputable, as I have stated, that the first section imposes a *general* prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make it operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. (Italics mine.)

I respectfully submit that the only rational construction of the Eighteenth Amendment is the one above suggested, under which the Amendment neither forbids nor licenses the special use of intoxicating liquors, but contents itself with a general prohibition, leaving to Congress the discretionary power of determining what exceptions may fairly be implied that would not be destructive of the general prohibition.

This does not mean that Congress has any unlimited discretion in the matter. It can not create, by statutory law, an exception which would defeat the law;

but, in harmony with the legislation of the States, with which the Amendment sought to work in cooperation to suppress a great evil, Congress, to whom the duty was committed of providing enforcing statutes, was empowered to say, *within reasonable limits*, under what circumstances and for what special purposes the general prohibition should not be enforced in its rigid letter.

If this view be sound, then the power of Congress to determine amounts of intoxicating liquors a druggist could be permitted to have, and its power to vest in the Treasury Department, and especially in the Commissioner of Internal Revenue, the determination of the question of the quantity of liquor that any pharmacist or physician might have or prescribe for a special purpose permitted by the law is clear.

Even if this interpretation of the Eighteenth Amendment is not correct, the fact remains that, even though the Eighteenth Amendment does not forbid the use of intoxicating liquors for medicinal purposes, yet, if Congress reaches the conclusion that, in enforcing the policy of prohibition, it is necessary to forbid any special use of so-called "nonbeverage liquors," its power is equally beyond dispute. (See *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.) If, as in the case last cited, a State, in enforcing its laws against intoxicating liquors, may forbid the use of a liquor which is, in fact, not intoxicating, then, *a fortiori*, it can forbid an otherwise legitimate use of intoxicating liquors, if such inhibi-

tion is necessary to prevent the traffic in such liquors for so-called "beverage" purposes. Therefore, for the purpose of the instant cases, it is not important whether the Court construes the Eighteenth Amendment as either impliedly permitting or impliedly forbidding the manufacture and transportation of intoxicating liquors for medicinal or other special purposes, sometimes inaptly called "nonbeverage" purposes, for, in either event, the power of Congress under clause Second of the Eighteenth Amendment to do whatever it, in good faith, regards as reasonably appropriate to carry into effect the great policy of the Amendment still remains.

But the true construction of the Eighteenth Amendment may be of great importance in other cases that may hereafter arise. That the Eighteenth Amendment will remain a part of the Constitution, as far as the vision of man can now see, seems reasonably probable. It is a great, and, in its laudable motive, a noble experiment in moral reform, and its success may hereafter depend, to some extent, upon its adaptability to what is possible in a nation such as ours. To make Prohibition really effective may require much more drastic legislation than anything now on the statute books. Thus it may become necessary to forbid absolutely the use of intoxicating liquors of any kind for medicinal purposes. If so, it is important that the power of Congress to do so should be recognized in these cases.

Upon the other hand, it may seem necessary to Congress, if the policy of Prohibition is to be sustained in the test of practical application and is to have be-

hind it the force of public opinion, to enlarge the special uses for which intoxicating liquors may be manufactured and transported, which, as in the case of Church ceremonials, certainly have the approval of the great majority of our people.

If the law is not sufficiently elastic to permit its adaptation to the necessities and convictions of the people, then it may, in the course of a generation, become as much a dead letter as the Fifteenth Amendment. All laws rest, in the last analysis, upon public opinion. No form of government and no scheme of legislation can long endure if hostile to the political capacities and moral convictions of the people; and the success of this great moral experiment, therefore, lies in its elasticity, and this fact was presumably recognized by the propounders of the Eighteenth Amendment when its language was confined to the statement of a general objective and the details of enforcement were left to the sound discretion of Congress.

It is wholly improbable that the language of the Amendment will be altered; but Congress, in enforcing the article by appropriate legislation, may make such provisions as the experience of each successive generation may seem, in the wisdom of Congress, to justify.

The Judicial Department of the Government should, I respectfully submit, sustain Congress in the exercise of this discretion, unless and until the Congress clearly transgresses or evades its power and duty of enforcement.

JAMES M. BECK,
Solicitor General.

MARCH, 1924.

APPENDIX.

FLORIDA.

[Article XIX, Constitution of Florida, adopted November 5, 1918, effective January 1, 1919.]

"SECTION 1. The manufacture, sale, barter, or exchange of all alcoholic or intoxicating liquors and beverages, whether spirituous, vinous or malt, are hereby forever prohibited in the State of Florida, except alcohol for medical, scientific or mechanical purposes, and wine for sacramental purposes, the sale of which wine and alcohol for the purposes aforesaid shall be regulated by law.

"SEC. 2. The Legislature shall enact suitable laws for the enforcement of the provisions of this article.

"SEC. 3. This article shall go into effect the first day of January, A. D. 1919."

IDAHO.

[Article III, Constitution of Idaho, adopted November 7, 1916, effective May 1, 1917.]

"SECTION 26. From and after the first day of May in the year 1917, the manufacture, sale, keeping for sale, and transportation for sale of intoxicating liquors for beverage purposes, are forever prohibited. The Legislature shall enforce this section by all needful legislation."

KANSAS.

[Article XV, Section X, Constitution of Kansas, adopted 1880.]

"The manufacture and sale of intoxicating liquor shall be forever prohibited in this State, except for medicinal, scientific and mechanical purposes."

MAINE.

[Article V, Amended, Constitution of Maine, adopted 1884.]

"The manufacture of intoxicating liquors, not including cider, and the sale and keeping for sale of intoxicating liquors, are and shall be forever prohibited. Except, however, that the sale and keeping for sale of such liquors for medicinal and mechanical purposes and the arts, and the sale and keeping for sale of cider may be permitted under such regulations as the Legislature may provide. The Legislature may enact laws with suitable penalties for the suppression of the manufacture, sale and keeping for sale of intoxicating liquors, with the exceptions herein specified."

MICHIGAN.

[Article XV, adopted November 7, 1916, effective May 1, 1918.]

"The manufacture, sale, keeping for sale, giving away, bartering or furnishing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, except for medicinal, chemical, scientific or sacramental purposes shall be, after April 30, 1918, prohibited in the State forever. The Legislature shall by law provide regulations for the sale of such liquors for medicinal, mechanical, chemical, scientific and sacramental purposes."

NEBRASKA.

[Article XVII, adopted November 7, 1916, effective May 1, 1917.]

"On and after May 1, 1917, the manufacture for sale, the keeping for sale or barter, the sale or barter under any pretext, of malt, spirituous, vinous or other intoxicating liquors, are forever prohibited in this State, except for medicinal, mechanical, or sacramental purposes."

NEW MEXICO.

[Article XXIII, adopted November 6, 1917, effective October 1, 1918.]

"SECTION 1. From and after the first day of October, A. D. nineteen hundred and eighteen, no person, association or corporation, shall within this State, manufacture for sale, barter or gift any ardent spirits, ale, beer, alcohol, wine or liquor of any kind whatsoever containing alcohol; and no person, association or corporation shall import into this State any such liquors or beverages for sale, barter or gift, and no person, association or corporation shall within this State sell or barter, or keep for sale or barter, any of such liquors or beverages for sale, barter or trade; provided nothing in this section shall be held to apply to denatured or wood alcohol, or grain alcohol when intended and used for medicinal, mechanical or scientific purposes only, or to wine when intended and used for sacramental purposes only.

"SEC. 2. Until otherwise provided by law, any person violating any of the provisions of section one (1) of this article shall, upon conviction, be punished by a fine of not less than fifty dollars nor more than one thousand dollars or shall be imprisoned in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment, and upon conviction for a second and subsequent violation of said section such person shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be imprisoned in the county jail or State penitentiary for a term of not less than three months nor more than one year."

NORTH DAKOTA.

[Article XX, Section 217, adopted October 1, 1889, effective November 2, 1889.]

"No person, association or corporation shall within this State, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale, or gift, barter or trade as a beverage. The Legislative Assembly shall by law prescribe regulations for the enforcement of the provisions of this article and shall thereby provide suitable penalties for the violation thereof."

OHIO.

[Article XV, Section 9, adopted November 5, 1918, effective May 27, 1919.]

"The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The General Assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental or other nonbeverage purposes."

OREGON.

[NOTE.—There have been two prohibition amendments in Oregon. The first adopted November 3, 1914, prohibited manufacture and sale, the second adopted November 7, 1916, prohibited importation.]

[Article I, Section 36, adopted November 3, 1914.]

"From and after January 1, 1916, no intoxicating liquors shall be manufactured or sold within this State except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes.

"This section is self-executing, and all provisions of the Constitution and laws of this State and of the

charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section are hereby repealed."

[Article I, Section 36a, adopted November 7, 1916, effective December 5, 1916.]

"No intoxicating liquors shall be imported into this State for beverage purposes.

"This section is self-executing, and all provisions of the Constitution and laws of this State and of the charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section, are hereby repealed."

SOUTH DAKOTA.

[Article XXIV, adopted November 7, 1916, effective July 1, 1917.]

TEXAS.

[Article XVI, Section 20.]

(Amendment to Constitution Adopted at Election May 24, 1919.)

"SECTION 20. (a) The manufacture, sale, barter and exchange in the State of Texas, of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or any other intoxicant whatever except for medicinal, mechanical, scientific or sacramental purposes, are each and all hereby prohibited.

"The Legislature shall enact laws to enforce this section.

"(b) Until the Legislature shall prescribe other or different regulations on the subject, the sale of spirituous, vinous or malt liquors, or medicated bitters, capable of producing intoxication or any other intoxicant whatever, for medicinal purposes, shall be made only in cases of actual sickness and then only upon the prescription of a regular practicing

physician, subject to the regulations applicable to sales under prescriptions in prohibited territory by virtue of Article 598, Chapter 7, Title II, of the Penal Code of the State of Texas.

"(c) This amendment is self-operative and until the Legislature shall prescribe other or different penalties, any person acting for himself or in behalf of another, or in behalf of any partnership, corporation, or association of persons, who shall, after the adoption of this amendment, violate any part of this constitutional provision, shall be deemed guilty of a felony, and shall, upon conviction in a prosecution commenced, carried on and concluded in the manner prescribed by law in cases of felonies, be punished by confinement in the penitentiary for a period of time not less than one year nor more than five years, without the benefit of any law providing for suspended sentence. And the district courts and the judges thereof, under their equity powers shall have the authority to issue, upon suit of the attorney general, injunctions against infractions or threatened infractions of any part of this constitutional provision.

"(d) Without affecting the provisions herein, intoxicating liquors are declared to be subject to the general police power of the State; and the Legislature shall have the power to pass any additional prohibitory laws, or laws in aid thereof, which it may deem advisable.

"(e) Liability for violating any liquor laws in force at the time of the adoption of this amendment shall not be affected by this amendment, and all remedies, civil and criminal, for such violations shall be preserved."

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Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

EDWARD AND JOHN BURKE, LIMITED,
Appellant,

vs.

DAVID H. BLAIR,
Commissioner of Internal Revenue, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO SUBSTITUTE PALMER CANFIELD, FEDERAL PROHIBITION DIRECTOR FOR THE STATE OF NEW YORK, AS DEFENDANT AND APPELLEE HEREIN, IN SUCCESSION TO E. C. YELLOWLEY.

SAMUEL W. MOORE,
MARCUS L. BELL,
Solicitors for Appellant.

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Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

EDWARD AND JOHN BURKE, LIMITED,
Appellant,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion to substitute Palmer Canfield, Federal Prohibition Director for the State of New York, as defendant and appellee herein, in succession to E. C. Yellowley.

Comes now the appellant, Edward and John Burke, Limited, and moves the Court to substitute Palmer Canfield, the present Federal Prohibition Director for the State of New York, as a party defendant and appellee herein, in place of defendant and appellee E. C. Yellowley, and as ground for the motion assigns the following:

At the time of the institution of this action, in November, 1922, the said E. C. Yellowley was the Acting Federal Prohibition Director for the State of New York,

and was made a party defendant in that official capacity. Thereafter, and in April, 1923, the said E. C. Yellowley was removed from said office and transferred to Washington, D. C., and the said Palmer Canfield is his successor in office, and is now the duly appointed and acting Federal Prohibition Director for the State of New York, and the presence herein as a party defendant and appellee of the person holding said office and performing the duties therof, is necessary to obtain a settlement of the questions involved.

There is no objection on the part of the Government to the granting of this motion.

SAMUEL W. MOORE,
MARCUS L. BELL,
Solicitors for Appellant.

January, 1924.

Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

EDWARD AND JOHN BURKE, LIMITED,

Appellant,

vs.

DAVID H. BLAIR,
Commissioner of Internal Revenue, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT.

SAMUEL W. MOORE,
MARCUS L. BELL,
Solicitors for Appellant.

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CASES AND MEDICAL AUTHORITIES CITED

Supreme Court of the United States,

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No. 245.

EDWARD AND JOHN BURKE, LIMITED, Appellant,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue, *et al.*, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Reply Brief for Appellant.

I.

The fallacy involved in the Government's position.

The brief of the Government serves to bring into prominent relief the precise ground upon which it rests its case. This is the assertion that the express power of Congress to prohibit the manufacture, sale or transportation of intoxicating liquors for *beverage* purposes, carries with it the incidental power absolutely to prohibit the manufacture and sale of intoxicating liquors for *non-beverage* purposes as well. This proposition of law is most emphatically denied by the appellant, its contention

being that while Congress, in the exercise of its express power to prohibit the manufacture and sale of beverage liquors, has the incidental power to impose reasonable regulations upon the sale of non-beverage liquors, to prevent their use for beverage purposes, such regulations must stop short of the absolute prohibition contained in the Willis-Campbell Act.

The Government's contention, if carried to its full extent, would empower Congress, under its power to prohibit the sale of beverage liquors, likewise to prohibit, if deemed by it necessary, the sale of *all* non-beverage liquors, whether "for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes." The means that this Court is asked to write into the Amendment, by judicial interpretation, a grant of *unlimited* power over intoxicating liquors, in place of the *limited* grant made by the States in ratifying the Amendment. The Court is asked to re-write the Amendment so as to make it read:

> The manufacture, sale, or transportation of intoxicating liquors for beverage *and non-beverage purposes* is hereby prohibited.

The purpose of the Amendment and the end sought to be attained are entirely clear. When, in 1917, Congress directed that the proposed amendment be submitted to the States for their ratification, the outstanding purpose was to secure *uniform* national legislation to correct the evils of intemperance. The slogan was that the saloons must go. At that time some of the States had in force constitutional or statutory prohibition acts; in others, state-wide laws permitted the licensing of saloons, and in still others, local option laws were in force, so that saloons were lawful in portions of a given State and unlawful in others. It was evident that so long as

saloons continued to operate in one State, it tended to defeat the prohibition policy of an adjoining State; or if maintained in one county, it tended to defeat the prohibition policy of an adjoining county. Every one realized, therefore, that the evils of intemperate could not be satisfactorily and effectively remedied by State action. It was a subject matter which, by its very nature, could only be dealt with by national legislation, providing a uniform rule effective everywhere within the jurisdiction of the national government. The purpose of the Eighteenth Amendment, therefore, was to provide national legislation, with all the resources of the national government for its enforcement, which would completely outlaw the saloon, and put an effectual stop to the use of intoxicating liquors for beverage purposes.

There was no thought or purpose or intention on the part of any one to provide any uniform national rule upon the subject of intoxicating liquors for medicinal or other non-beverage purposes. This was a matter local to each State. Some States, in the exercise of their police powers, had prohibited the use of intoxicating liquors for non-beverage as well as for beverage purposes. Other States, and perhaps a majority of them, had pursued the policy of permitting, under reasonable restrictions, the use of non-beverage intoxicating liquors for various purposes. Each State was well within its rights in legislating as it deemed best for the interest of its own citizens. There was no reason for any uniform national rule upon this subject, and no demand for one.

In framing the Eighteenth Amendment to be submitted to the several States, Congress was careful to limit the grant of power, which it thereby sought, to the prohibition of intoxicating liquors for *beverage* purposes. It said, in substance, to the States: "We ask from you the constitutional power to enact laws prohibit-

ing the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, which will effectively banish the saloon and cure the evils of intemperance. Each State will retain the right, which it has always possessed, in the exercise of its police power, to deal with non-beverage liquors in such manner as its own public policy may dictate."

Undoubtedly, the State legislatures, in ratifying the amendment, understood, as they were amply justified in believing, that, although they were granting to Congress a concurrent power to prohibit the manufacture and sale of intoxicating liquors for beverage purposes, they were at the same time reserving and retaining their own police powers over non-beverage liquors. The States had not been asked to surrender their legislative control over non-beverage liquors. It is scarcely conceivable that any State legislator, in voting to ratify the amendment, supposed he was voting for such a surrender. It is by no means certain that the amendment would have been ratified if the States had understood that they were surrendering all legislative control over *both* beverage and non-beverage liquors.

The authorities relied upon by the Government do not sustain its position.

It is respectfully submitted that the Government wholly overlooks the fact that its legislative power over intoxicating liquors is a *limited*, and not an unlimited power; that this subject matter, like the subject of commerce, has been divided between the Federal Government and the several States, each of which is supreme within its own domain.

The appellees (p. 10) point to the powers of the States effectively to prohibit the sale of intoxicating liquors for beverage purposes, and cite both State and Federal cases in support of the proposition.

No one at this time will deny the full and complete power of the several States to prohibit the manufacture and sale of intoxicating liquors of every description, and for any purpose. Their police powers not only permit but require legislation deemed beneficial to the inhabitants of a State, subject only to certain constitutional limitations. The distinguishing feature of this class of cases is that the power of the State is *unlimited*. It is a legislative domain in which the Federal Government has no share.

The case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, cited by the appellees, is an illustration of the unlimited police power of a State, exercised in the interest of its citizens. There a statute of Mississippi prohibited the sale of a malt liquor called "Poinsetta", which was alleged to be non-intoxicating. This statute was upheld in this Court against the claim that its enforcement violated any of the guaranties contained in the Federal Constitution. The Court said that the power of a State to prohibit the selling of intoxicating liquors is unquestioned, and inasmuch as its control was complete, it had the right to adopt such means as it deemed wise to accomplish its purpose. The case is no support for the Government's position. If the Eighteenth Amendment had conferred upon Congress a complete and undivided power over intoxicating liquors, such as was possessed by the State of Mississippi (which, of course, is not the case), it could prohibit or regulate, as it saw proper, and it might then be plausibly contended that the Willis-Campbell Act would be a lawful exercise of authority. It is quite another thing to assert that Congress, having by

virtue of the Eighteenth Amendment control only over beverage liquors (which is only a *part* of the legislative power possessed by the State of Mississippi), could lawfully prohibit the sale of a non-intoxicating malt liquor called "Poinsetta", or any other non-beverage liquor. The power of a State, with its unlimited control, is quite different from the limited legislative power conferred on the Congress by the Amendment.

The appellees also assert that Congress, in passing the Willis-Campbell Act, was not restricted to mere regulation if the end sought could not be accomplished except by prohibition, and they point to *Ruppert* v. *Caffey*, 251 U. S. 264, and *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146. These cases do not, it is respectfully submitted, support the Government's contention. They are based upon the exercise by the Government of its war power. "The complete and undivided character of the war power of the United States is not disputable" (*Northern Pacific R. Co. v. North Dakota*, 250 U. S. 135; *Selective Draft Law Cases*, 245 U. S. 366). The Tenth Amendment is no obstacle to its exercise. During the existence of the war emergency and until a return to normal conditions, Congress had a complete, unlimited and undivided power over intoxicating liquors of every description, and for every purpose. The cases cited not only fail to sustain the position of the Government, but they serve to bring into prominence the vital difference between the legislative power of Congress when it possesses unlimited control of the legislative field, during a period of war, and the limited control which it now possesses under the Eighteenth Amendment.

The appellees also rely upon decisions upholding the power of Congress to legislate with respect to the use of intoxicating liquors in the Territories, and to prevent their introduction and sale among the Indian tribes.

But here, again, the power of Congress to legislate within the Territories is complete and unlimited; and likewise the power of Congress to enact laws for the protection of the Indians, who are wards of the Government (*U. S.* v. *Sandoval,* 231 U. S. 28; *Hallowell* v. *U. S.,* 221 U. S. 317), is unlimited and complete in itself. There is here no division of power between the Government and the States, as there is between beverage and non-beverage liquors, or between interstate and intrastate commerce.

It is argued, however, that the power to regulate includes the power to prohibit (p. 11), and reference is made to the *Lottery Case,* 188 U. S. 321. It is there held that the express power of Congress to regulate interstate commerce includes the power to prohibit the interstate transportation of lottery tickets. If the Eighteenth Amendment had contained an express grant of power to Congress to "regulate" non-beverage liquors, the argument would be more plausible. But the fact that the regulation of non-beverage liquors was reserved to and retained by the several States makes the argument inapplicable here.

The express power to "regulate" non-beverage liquors, it is respectfully contended, was denied to Congress when the Eighteenth Amendment was ratified. It is illogical, therefore, to insist that it exists as an incidental power. An incidental power can not be invoked to create powers which, expressly or by reasonable implicable, are withheld; nor can it be invoked to enlarge powers actually granted, but only to carry into effect those which are granted. The latest expression of the Court in support of this proposition is *First National Bank* v. *Missouri,* decided January 28, 1924, where it is said:

> But it is said that the establishment of a branch bank is the exercise of an incidental power conferred by Section 5136 R. S. by which national

> banking associations are vested with "all such incidental power as shall be necessary to carry on the business of banking." The mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business, within the meaning of this provision. Moreover, the reasons adduced against the existence of the power substantively are conclusive against its existence incidentally; *for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given;* but only to carry into effect those which are granted.

An express power to "regulate" non-beverage liquors having been denied to the Federal Government, how can any incidental power to prohibit them be deemed to exist? The only incidental power which can arise from the express language of the Eighteenth Amendment is to carry it into effect, which, as above stated, is limited to reasonable regulations to prevent beverage liquors from being sold under the guise of non-beverage liquors. Such regulation must stop short of actual prohibition.

Limitations upon the incidental power of Congress.

The fallacy of the Government's position that Congress is not restricted to regulation of non-beverage liquors, if absolute prohibition is necessary, may be shown by a consideration of Congressional legislation in aid of other constitutional provisions, where an appeal to the incidental power of Congress has proven unavailing.

The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude * * * shall exist within the United States, or any place subject to their jurisdiction"; and that "Congress shall have power to enforce this article by appropriate legislation." Here Congress is given a grant of power to prohibit slavery and involuntary servitude, in the same manner as by the Eighteenth Amendment it is given power to prohibit the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. In each case the grant of power is to be enforced by "appropriate" legislation. The same grant of power to enforce by appropriate legislation is contained in the Thirteenth, Fourteenth, Fifteenth, Eighteenth and Nineteenth Amendments.

It is interesting to note the effect which might be given to the Thirteenth Amendment if the incidental power of Congress were as broad, extensive and comprehensive as claimed by the appellees. The amendment prohibts *involuntary* servitude. Voluntary servitude, inhering in the relation of master and servant, is a legislative subject matter withheld from Congress (with certain well recognized exceptions), and reserved to the several States. But many employments are for inadequate wages, and sometimes under conditions which approximate a state of involuntary servitude. May Congress exert its incidental power to the extent of regulating the relations of master and servant within the several States, in order to make effective its power to prevent involuntary servitude? The ruling of this Court in the first *Federal Employers' Liability Cases* answers this question in the negative. May Congress so exercise its incidental power as to regulate wages of employment where, in its judgment, they are so low as to approximate a condition of involuntary servitude? If so, a minimum wage law, enacted by Congress, would find support in

the incidental power of Congress to make effective the Thirteenth Amendment. But a minimum wage law did not find favor with this Court (*Adkins* v. *Children's Hospital,* 261 U. S. 525, decided April 9, 1923). It is to be noted that counsel in that case did not seek to support the act there under consideration by an appeal to the incidental power of Congress to make effective the constitutional provision against involuntary servitude.

The extent of the incidental power of Congress came before this Court in *Hodges* v. *United States,* 203 U. S. 1. There certain individuals were indicted under sections 1977 and 5508, Revised Statutes, for compelling negro citizens, by intimidation and force, to desist from performing their contracts of employment. The Government relied upon the incidental power of Congress under the Thirteenth Amendment, to support the statute. It argued, as appears from the opinion, that one of the disabilities of slavery, one of the *indicia* of its existence, was a lack of power to make or perform contracts, and that when the defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract, they, to that extent, reduced those parties to a condition of slavery—that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. It was held, however, that the United States Court had no jurisdiction of the wrong charged in the indictment, and that redress must be sought from the State Courts, under State laws. The Court said:

> Notwithstanding the adoption of these three (*post bellum*) amendments, the national government still remains one of enumerated powers, and the 10th Amendment, which reads, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people,"

> is not shorn of its vitality. True, the 13th Amendment grants certain specified and additional powers to Congress, but any congressional legislation directed against individual action which was not warranted before the 13th Amendment must find authority in it.

In the *Civil Rights Cases*, 109 U. S. 3, the Act of Congress of March 1, 1875, provided that all persons within the jurisdiction of the United States should be entitled to equal accommodations and privileges in inns, public conveyances, theatres and other places of amusement. Certain colored persons were denied the accommodations and privileges specified in the Act, and prosecutions were instituted. It was sought to sustain the Act by a resort to the incidental power of Congress to give effect to the Thirteenth Amendment. It was argued that a denial of equal accommodations and privileges to colored men amounted to a subjection to a species of involuntary servitude, within the meaning of the amendment, and that Congress had the right to enact all necessary and proper laws for the abolition and prevention of slavery, with all its badges and incidents, and, therefore, that Congress had the power, under the amendment, to pass the statute in question. The incidental power alleged to exist is thus stated by the Court (p. 20):

> It is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances and places of public amusement.

The Court denied the claim, and held the statute unconstitutional, saying, (p. 24):

> It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.

In the later case of *Butts* v. *Merchants Transp. Co.*, 230 U. S. 126, the Court, in referring to its holding in *Civil Rights Cases*, said that the statutes then under consideration, as applying to the States, were "unconstitutional and void because in excess of the power conferred upon Congress, and an encroachment upon the power reserved to the States respectively."

The Fifteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude"; and that "The Congress shall have power to enforce this article by appropriate legislation."

Here, again, it was claimed (*James* v. *Bowman*, 190 U. S. 127) that Congress possessed the incidental power, under the amendment, to punish individuals who, by means of bribery, prevented certain colored persons, to whom the right of suffrage was guaranteed by the amendment, from exercising that right. It was held, however, that section 5507, Revised Statutes, therein invoked, could not be sustained as a proper exercise of the power granted to Congress by the amendment.

Again, the Sixteenth Amendment confers upon Congress the "power to lay and collect taxes upon incomes, from whatever source derived, without apportionment among the several states, and without regard to any

census or enumeration." The States, also, by virtue of their sovereignty, have the power, normally pertaining to governments, to resort to all reasonable forms of taxation in order to defray governmental expenses, and this includes the right to impose a tax upon the income of residents and non-residents alike (*Shaffer* v. *Carter*, 252 U. S. 37, 50). Here are two distinct powers of taxation, one residing in the general government, and the other in each of the several States. Each is supreme in its own domain, and neither can encroach upon the other. The Federal Government possesses the incidental power to pass the legislation necessary to render effectual its power of taxing incomes; but no one would contend that this incidental power can extend so far as to prohibit the several States from assessing and collecting their own income taxes. If, for illustration, Congress should decide that the Federal Government needed the income taxes assessed by the several States, as well as those assessed by its own authority, and should pass an act increasing the Federal income tax of every citizen in the United States by the amount of the income tax assessed against him under State authority, and prohibiting him from paying that assessment to the State authorities, would any one contend that such an enactment did not transcend the lawful power of Congress?

Counsel admit (p. 11) that in enacting the Willis-Campbell Act, Congress "may have gone to the extreme extent of its power." It is difficult to see how Congress could have gone farther than it did with respect to the use of malt liquors for medicinal purposes. True, it might have gone farther and prohibited the use of intoxicating liquors of every kind and description for medicinal, sacramental and industrial purposes. If Congress, acting under its incidental power, can prohibit the use of intoxicating liquors for one non-beverage

purpose, it can prohibit their use for all non-beverage purposes. But this would be equivalent to saying that the existence of the incidental power is sufficient to create an express legislative power over non-beverage liquors, which the States and the people, in ratifying the Eighteenth Amendment, withheld from Congress and left with the States, where it had always resided. Legislative power legitimately belonging to the several States can not be appropriated by Congress in this manner.

II.

There is no justification for the statement in appellee's brief that stout possesses no therapeutic value.

It is asserted in the appellees' brief (p. 9):

> Congress determined that malt liquors have no therapeutic value and are no remedy of any sort for any kind of disease whatsoever; that they serve no medicinal purpose which can not satisfactorily be met in other ways.

For support of this statement, reference is made to proceedings before Congress, reports to the Prohibition Unit, and to the alleged number of physicians of the country who prescribe no liquors whatsoever, and to other matters outside of the record. Without in any way waiving the well-settled rule that matters of fact alleged in the bill are deemed to be true upon demurrer or motion to dismiss, we proceed to point out that there is no justification for the statement.

It appears in *Lambert* v. *Yellowley,* 291 Fed. 640, 642, that a questionnaire was directed to upwards of 30,000 physicians to secure their opinion as to whether or not

the use of liquor in the treatment of certain known ailments is a valuable therapeutic agent. Of this number, 51 per cent. declared whiskey to be necessary in the treatment of certain diseases, and 49 per cent. took a contrary view. In the same opinion reference is made, at page 644, to the fact that 22 states permit the use of intoxicating liquors for medicinal purposes.

Nowhere in the Willis-Campbell Act is there any finding, direct or indirect, that stout, or any other malt liquor, is not a valuable therapeutic agent. Had Congress desired to make a finding of that nature, presumably it would have done so in plain, unambiguous words. Congress contented itself with making it a criminal offense for physicians to prescribe malt liquors, including stout, for their patients.

It is further argued that the Willis-Campbell Act expresses the legislative judgment of Congress that the prohibition of the use of malt liquors for medicinal purposes was necessary to make effective its constitutional power over beverage liquors. It will be found, however, that there is nothing in the legislative history of the Act which supports this argument. The report of the Senate committee recommending the passage of the Act is illuminating. So much (Report No. 201, 67th Congress, 1st Session) as bears upon the matter in question is as follows:

> Section 2 is altogether the most important section of the bill and is rendered necessary by the opinion of the former Attorney General, relative to the right, under the national prohibition act, to prescribe beer or wine for medicinal purposes. Without question the obvious effect of the interpretation put upon the law by the Attorney General would be to permit physicians to prescribe either beer or wine for such purposes, and the unfortunate feature of such interpretation is that

if such liquors can be prescribed at all they can be prescribed in unlimited quantities, and if this can be done the prohibition law will in large measure be nullified. Under the interpretation of the Attorney General, with which there is no disagreement by the committee, the Commissioner of Internal Revenue is now contemplating the issuance of regulations governing the manufacture of beer for medicinal purposes, and this fact adds emphasis to the need of enacting this proposed legislation at the earliest possible day.

Section 2 has the effect of prohibiting the use of beer for medicinal purposes and limits the amount of the alcohol in any vinous liquor which may be so prescribed or sold for medicinal purposes to 24 per cent by volume, and limits the amount of alcohol which may be prescribed for any person within any period of 10 days, whether the same be contained in vinous or spirituous liquors, or both, to one-half pint. This leaves physicians the right to prescribe either spirituous or vinous liquor, with specific limitation as to the quantity of liquor and the alcoholic contents thereof.

It will be noted that the report states "Section 2 has the effect of prohibiting the use of *beer* for medicinal purposes", etc. Stout is not mentioned in the report, and there is no indication that the committee intended to condemn its use for medicinal purposes.

The matters which moved the committee to recommend the passage of the bill were the fact that the National Prohibition Act, in the opinion of the Attorney General, permitted physicians to prescribe either beer or wine for medicinal purposes, and the "unfortunate feature" was that the law did not place any limit upon the quantities of beer and wine which might be so prescribed. Therefore, some legislation, presumably imposing a limit upon the quantity of beer or wine which might be prescribed, was necessary.

The plain remedy which the situation suggested was to place a limitation, by Congressional action, upon the amount of beer or wine which might be lawfully prescribed; but instead of so doing, the recommendation of the committee was that the use of beer for medicinal purposes be absolutely prohibited, and a limitation placed upon the amount of wine that might be prescribed. The prohibition was aimed at beer, and was a clear *non sequitur* from the "unfortunate feature" which the opinion of the Attorney General made apparent.

There is no suggestion in the committee's report that either beer or wine was not a medicinal agent, nor is there any suggestion that it was necessary to outlaw malt liquors, including stout as well as beer, in order to prevent beverage liquors from being sold in violation of law. There is a strong and compelling inference to the contrary. Both wine and beer, it is pointed out, can be prescribed, under the National Prohibition Act, in unlimited quantities. Logically enough, the committee recommended that a restriction be placed upon the amount of wine which could lawfully be prescribed.

Why could not a similar restriction be placed upon the use of malt liquors, for the same purpose? If one may be regulated, why may not the other also be regulated? It must be apparent to anyone that by reason of its greater bulk and weight, the clandestine and illegal dealing in stout, or other malt liquor, is much more difficult and more liable to discovery than is the case with wine. The difference in their treatment was arbitrary and illogical in the face of the report. Certainly, there is no justification whatsoever for the claim that Congress, in so far as its action may reflect the report of the Senate committee, found it necessary to place a ban upon the use of all malt liquors for medicinal purposes in order to prevent beverage liquors from coming into unlawful use.

Nor is there anything in the report of the House committee (Report No. 224, 67th Congress, 1st Session) which sustains the argument that Congress deemed prohibition of the use of stout for medicinal purposes as necessary to make effective its power over beverage liquors. So much of the reports as refers to the matter under consideration is as follows:

> Section 2 prohibits the use of beer as medicine and limits the alcoholic strength and the quantity of wine that may be prescribed. * * *
>
> The evidence presented to the committee to the effect that beer has never been recognized as a medicine was overwhelming. The United States Pharmacopoeia has never listed it as a medicine.
>
> One hundred and four of the leading physicians and scientists in the Nation signed the following statement:
>
> > The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopoeia as official medicinal remedies. *They serve no medicinal purpose which can not be satisfactorily met in other ways*, and that without the danger of cultivating the beverage use of an alcoholic liquor.
>
> Several thousand other physicians signed the above, or a similar statement, and presented it to the committee.

Here, again, it is stated that "Section 2 prohibits the use of *beer* as medicine", etc. Stout is not mentioned in the report.

The significant statement in the foregoing report is that malt liquors "serve no medicinal purpose which can not be satisfactorily met in other ways". This is very

far from saying that they have no therapeutic value; on the contrary, the statement is that they do possess a recognized therapeutic value, but that, in the opinion of many persons, other medicines may preferably be used as a substitute.

Congress, in passing the Act, was in the attitude of deciding between two recognized therapeutic agents, in so far as the Act may be said to reflect the opinion of the committee. It said, in effect, that malt liquors are recognized therapeutic agents, but that there are other therapeutic agents equally good which should be used as a substitute. The physician, therefore, shall not be permitted to make his choice as heretofore; he may not prescribe malt liquors for his patient, even though, in his informed judgment, such a course may be for the patient's welfare, but must, under the compulsion of heavy penalties, prescribe a substitute. Thus, Congress is permitted to invade the domain of medical science and decide for the physician what remedies he shall prescribe.

III.

Stout is recognized as a valuable therapeutic agent by standard medical authorities.

It is said by counsel (p. 7) that only one physician appeared before the committee in advocacy of malt liquors as a medicine, and that his attitude was promptly repudiated by the Medical Society of the State of New York.

The inference is thus sought to be created that the medical fraternity does not recognize stout as a remedial agent; but this is far from accurate. In the library of the Academy of Medicine of New York City there are

many standard works which recognize the therapeutic value of malt liquors generally, and of stout in particular. In some instances, for reasons given, superior efficacy is ascribed to them over vinous or spirituous liquors. A few extracts from these medical works will be given, not for the purpose of showing that stout is a therapeutic agent, since that stands admitted by the pleadings, but for the purpose of showing that the inference sought to be conveyed by counsel is wholly unwarranted.

Robert Hutchison, M.D. (Edinburgh; F.R.C.P. Physician to the London Hospital, with charge of outpatients to the Hospital for Sick Children, Great Ormond Street; author of "Lectures on Diseases of Children", "Patent Foods and Patent Medicines", "Applied Physiology", joint author of "Clinical Methods") says (p. 369, *Food and Dietetics,* 4th Edition, 1916):

> Stout is popularly believed to be more "digestible", and perhaps rightly, but bottled stout is an admirable soporific. "If it be desired to avoid nervousness", says Hutchinson, "and to get rid of insomnia, shun tea and coffee, and drink Guinness's stout. * * * I scarcely ever met with a man who could withstand the soporific effects of bottled stout. It is far better than opium, and induces a more nearly natural sleep."
>
> The large quantity of carbohydrate matter in malt liquors renders them the most truly nourishing of alcoholic drinks. A pint of good ale contains as much carbohydrate as 1-1/5 ounces of bread.

In *Modern Materia Medica and Therapeutics,* by A. A. Stevens, A.M., M.D., it is said (p. 598, 5th Ed., 1909):

> Diseases of the Respiratory System.—Catarrhal Pneumonia. * * * Medicinal Treatment. * * * Alcohol is useful in some cases, but not in

all. Each case must be carefully considered by itself. The danger of inducing the alcoholic habit must also be borne in mind. Malt liquors and wines are usually the best preparations when digestion is good, but when the digestive power is feeble whisky or brandy, well diluted is preferable. Alcohol is best given with the food.

In *Dietetics,* by William Tibbles, L.L.D., M.D., Chicago, L.R.C.P., Edin., M.R.C.S., England, L.S.A., London Medical Officer of Health, Fellow of the Royal Institute of Public Health, Etc., Author of "Food and Hygiene", "Foods:: Their Origin, Manufacture, and Composition", "Diet in Dyspepsia", "The Theory of Ions", etc., 1914, the author says, at page 257:

> Beer, ale, and stout, by virtue of their taste, aromatic bitters and tonics, give a relish to food, increase appetite, and promote the flow of saliva. To this extent they assist digestion. They are useful to convalescents, those enfeebled by chronic diseases, and the aged. They are of some value to those whose occupation is sedentary, whose stomach has lost tone by overwork, rush, and worry, and to sufferers from neuralgia and insomnia. The limit should be 1 pint a day. They are contra-indicated in neurotic conditions, diabetes, gout, rheumatism, obesity, and genito-urinary diseases.

In *Foods and Diets,* by Robert F. Williams, M.A., M.D., Professor of Practice of Medicine in the Medical College of Virgina, 1906, the author says, at page 270:

> Good beer, porter, or ale is permissable when it is preferred by the patient, especially in warm weather, and it is often more efficient than wines or spirits in stimulating the appetite. It is useful, also given at bedtime, for preventing sleeplessness.

In *Principles of Hygiene,* by D. H. Bergey, A.M., M.D., Dr. Ph., Assistant Prefessor of Hygiene and Bacteriology, University of Pennsylvania, 7th Edition, Revised 1921,—the author says, at p. 224:

> Physiologic experiments have demonstrated that the alcoholic beverages may be regarded as food, not only on account of the quantity of alcohol present, but also on account of the extractives which they contain. They serve to stimulate digestion and the nervous system. They also diminish the oxidation process of the body and lower the temperature. Small amounts of alcohol may be taken daily in the food, and, according to Professor Atwater's experiments, these small amounts are oxidized in the system and are therefore a source of energy.

In *Materia Medica and Therapeutics* by Reynold Webb Wilcox, M. A., M.D., LL.D., D.C.L., President of the American College of Physicians, Professor of Medicine (Retired) at the New York Post Graduate Medical School and Hospital, Consulting Physician to St. Marks, to the Nassau, to the Ossining, and to the Eastern Long Island Hospital; President of the Congress on Internal Medicine, Honorary Member of the Connecticut State Medical Society, Fellow of the American Academy of Medicine, Member of the Association of Military Surgeons and of the American Association for the Advancement of Science; formerly President of the American Therapeutics Society, of the Medical Association of the Greater City of New York, of the Society of Medical Jurisprudence, and of the Association of the Medical Reserve Corps, United States Army, 10th Edition, Revised in accordance with the United States Pharmacopoeia, 1917, the author says at page 538:

> As malt liquors contain malt extract as well as hops, and aromatic bitters, their nutritive, tonic

and stomachic qualities are greater than those of spirits or wine.

In *Materia Medica and Therapeutics, with Special Reference to the Clinical Application of Drugs,* by John V. Shoemaker, M.D., LL.D., Professor Materia Medica, Pharmacology, Therapeutics, and Clinical Medicine, and Clinical Professor of Diseases of the Skin in the Medical Chirurgical College of Philadelphia; Physician to the Medical Chirurgical Hospital, Member of the American Medical Association, of the Pennsylvania and Minnesota State Medical Societies, American Academy of Medicine, British Medical Association, Fellow of the Medical Society of London, 7th Edition, 1908, the author says, at p. 169-170:

> Malt liquor—ale, beer, porter, etc—are produced by fermentation of malt and hops and contain nutritive material, together with a small proportion of diastase which makes them useful in certain cases of weak digestion. They contain only from 6 to 10% alcohol. Malt liquors can be taken by those who suffer from the cerebral effects of wine, but to some they are unpleasant in their effect upon the brain, owing to the oil of hops which they contain (Rossbach).

In *Principles of Medical Treatment,* by George Cheever Shattuck, M. D., A.M., Assistant Professor of Tropical Medicine, Harvard Medical School, formerly Assisting Physician, Massachusetts General Hospital,—5th Revised Edition, 1921, the author says, at p. 291:

> * * * Beer, ale, porter, or malt may be prescribed with meals to improve appetite and to promote increase of weight.

Chalmers Watson, M.D. F.R.C.P.S., Assistant Physician, Royal Infirmary, Edinburgh, Editor of the En-

cyclopedia Medica, Second Edition, 1913, says (p. 152-153):

> In acute diseases * * * a glass of beer or stout, given with one or two meals daily for a time, is occassionally of distinct value, acting as a bitter tonic and at the same time supplying a relatively large amount of nutriment in a fluid form.
>
> In protracted convalescence from some acute diseases, a glass of beer, a little whiskey in water, or a glass of wine, taken with chief meals, may improve digestion and accelerate the road of recovery. The advantages of these are best seen in some cases of influenza.

In *The Practitioner's Encyclopedia of Medical Treatment,* edited by W. Langdon Brown, M.D., F.R.C.P., Assistant Physician to St. Bartholomew's Hospital and Physician to the Metropolitan Hospital, and J. Keogh Murphy, M.C., F.R.C.S., Surgeon to the Miller General Hospital for South East London and to Paddington Green Children's Hospital, 1915, it is said (p. 104):

> *Treatment of Septicaemia.*—The patient must be encouraged to take as much food as possible. * * * It should be remembered that a high temperature alone is no contraindication to a liberal diet and if the patient will take them, fish and chicken may be allowed throughout with a small quantity of alcohol, either as brandy (three ounces), or stout, or port wine.

In *Practical Therapeutics,* Hobart Amory Hare, M.D., B.Sc., Professor of Therapeutics, Materia Medica and Diagnosis in the Jefferson Medical College of Philadelphia; Physician to the Jefferson Medical College Hospital; one-time Clinical Professor of Diseases of Children in the University of Pennsylvania; Surgeon, U.S.N.R.F., 1919, says, at p. 81:

> Stout and porter are of value in wasting diseases, in convalescence from acute diseases and for nursing women.

In *Sajous's Analytical Cyclopedia of Practical Medicine,* by Charles E. de M. Sajous, M.D., LL.D., assisted by Louis T. de M. Sajous, B.S., M.D., with the active cooperation of over 100 associate editors, 7th Ed., 1913, Volume 1, at page 509, it is said:

> Malt liquors (beer, ale, brown stout, porter) contain less alcohol, but have greater nutritive value than any other of the alcoholic beverages. * * * When the digestive powers are but little impaired, beer is valuable as a tonic and nutritive. * * * The low percentage of alcohol content in beer renders it useful where the patient appears specially sensitive to the action of alcohol in the cerebrum.

In *Materia Medica Pharmacology & Therapeutics,* by Walter A. Bastedo, Ph. G. M.D., Assistant Professor of Clinical Medicine Columbia University, Associate Attendant Physician St. Luke's Hospital, N. Y.; Attending Physician City Hospital, N. Y.; Consulting Physician St. Vincent's Hospital, Staten Island; Consulting Gastroenterologist Staten Island Hospital; Fifth Vice-President U. S. Pharmacopoeia Convention; formerly Curator of the New York Botanical Garden, 2nd Ed. 1918, the author says at p. 324:

> Hence alcoholic drinks which promote the appetite, whether palatable wines or bitter malt liquors, have a distinct influence in the production of the psychic secretion or appetite gastric juice, and so may favor digestion.

In *Diet for the Sick,* by H. Edwin Lewis, M. D., formerly instructor chemistry and dietetics Fanny Allen

Hospital Training School for Nurses; formerly attending surgeon, Fanny Allen Hospital, Burlington, Vermont; formerly attending physician, New York Nose, Throat and Lung Hospital; member New York State Medical Society, American Medical Association, etc.; Third Edition Revised, 1915, p. 54, the author says:

> Ale, stout, porter and beer have a special tonic effect and the diastase which they contain aid the digestion of starchy foods.

In *Materia Medica and Therapeutics,* by Roberts Bartholow, Professor Emeritus of Materia Medica, General Therapeutics and Hygiene in Jefferson Medical College, Philadelphia, formerly Professor of Materia Medica and Therapeutics and of the Practice of Medicine in the Medical College of Ohio; Fellow of the College of Physicians of Philadelphia;—member of the American Philosophical Society; Honorary Fellow of the Royal Medical Society of Edinburgh; Honorary Member of the Societe Medico Pratique de Paris; author of a treatise on the practice of medicine, of a treatise on the practice of electricity, of a manual of Hypodermatic Medication, of the Russell and Jewett Prize Essays and the Prize Essay of the American Medical Association and of the Rhode Island Medical Society, Twelfth Edition, 1906, the author says, at p. 583:

> So far as alcohol is concerned, beer, ale and porter correspond in physiological action to the spirituous liquors and wines. As they contain malt extract, their nutritive value is greater than spirits and wines. An important constitutent, the hop, being an aromatic bitter, the tonic and stomachic qualities of these malt liquors are also greater than their congeners. * * * Beer, ale and porter are not usually prescribed in acute maladies. They are, however, much and justly es-

> teemed as stomachic tonics and restoratives in chronic wasting diseases—for example, in convalescence from acuite diseases and surgical injuries, in cases of acute and protracted suppuration, prolonged lactation, diseases of the joints, scrofula, phthisis. * * *
>
> When wakefulness is due to cerebral anaemia, a glass of beer or ale at bedtime will frequently produce satisfactory sleep. Puerperal mania, delirium tremens, and acute maniacal delirium, when these symptoms co-exist with a condition of adynamia, are greatly benefited by the liberal use of ale (pale or Edinburgh ale). The effect of this remedy is to arouse the appetite, to quiet delirium, and to produce sleep. In melancholia, excellent results are often obtained by the use of porter, with a little tincture of opium.

In *A Manual of Medical Treatment,* by J. Burney Yeo, M.D., F.R.C.P., Emeritus Professor of Medicine in King's College, London; consulting physician King's College Hospital; Hon. Fellow of King's College, Fifth Edition by Raymond Crawfurd, M.A., M.D., Oxon., F.R.C.P., Physician and Lecturer on Clinical Medicine to King's College Hospital; Fellow of King's College, London; Examiner in Medicine, Royal College of Physicians; late examiner in Materia Medica and Pharmacy, University of London, and E. Farquhar Buzzard, M.A., M.D., Oxon., F.R.C.P., Physician for Out-patients to St. Thomas's Hospital and to the National Hospital for the Paralyzed and Epileptic, Queen's Square; Consulting Neurologist to the Royal Free Hospital and to the Hospital for Diseases of the Throat, Golden Square; Late Physician to the Belgrave Hospital for Children, and Goulstonian Lecturer, Royal College of Physicians, etc., 1913, it is said at p. 498:

> The treatment of chlorosis and the anaemic state will be best considered from the three points

> of view—one, dietetics; two, hygienic; and three, medicinal. *One*—Diet—Defective or unsuitable food is one of the most frequent causes of anaemia. * * * Food must be presented to such patients in an attractive and palatable form, especially when there is great indisposition to take food from entire loss of appetitie. Simple, easily digested farinaceous foods must be given to supplement the diet: our object should be to depart as little as possible from the normal mixed dietary of the healthy adult. A certain amount of wine, such as good Burgundy, with or without water, should be useful both as a stimulant or a sedative; or a glass of porter or stout may sometimes be taken with advantage at bedtime with a biscuit or some bread and butter.

In an address on "*Alcohol as a Therapeutic Agent*", delivered at the 79th Annual Meeting of the Lancashire & Cheshire Branch of the British Medical Association, held in Liverpool June 28, 1905, Sir James Barr, M.D., F.R.C.P., F.R.S., Edin., President of the Liverpool Medical Institution, and of the Lancashire & Cheshire Branch of the British Medical Association; physician, Liverpool Royal Infirmary; Lecturer on Clinical Medicine, Liverpool University, said:

> Personally, I would rather have a glass of stout as a soporific than any of those depressing sulphur compounds which German manufacturers so diligently foist on the public. * * * Almost the only use for alcohol in pneumonia is as a soporific, and when given for this purpose I prefer a light draught beer or stout containing about 4 or 5% of alcohol.

In a paper on "*The Effects of Alcohol on the Gastro-intestinal Tract*" by William J. Mallory, A.M., M.D., Washington, D. C., Associate in Medicine, George Washington University Medical School, read before the Amer-

ican Therapeutic Association at its Annual Meeting, June 3, 1921, Washington, D. C. (Medical Records, Vol. 100, p. 275, Aug. 13, 1921), it was said:

> From the facts presented and their relation to human physiology, it is a reasonable deduction that alcoholic beverages have certain applications in the treatment of diseases in which it is desired to influence the gastrointestinal tract. * * *
>
> Therapeutic use and contraindication must be determined here as elsewhere by the physician who has diagnosed the particular case but a statement of certain principles with examples of application may be given.
>
> In any case, where it is desired to awaken or stimulate the appetite one of the wines or malt drinks would be an aid and the dose of beverage used for such a stimulant would not contain a sufficient quantity of alcohol to fall under any of the contraindications hereinafter mentioned.

In his book on *Dietotherapy,* William Edward Fitch, M.D., Major, M.R.C., U. S. A., says (Vol. 1, 1918, p. 566):

> Stout and porter are popularly believed to be more digestive. "If it is to be desired to avoid nervousness", says Hutchison, "and to get rid of insomnia, shun tea and coffee and drink stout."

In *Diet in Health and Disease,* by Julius Friedenwald, M.D., and John Rohrah, M.D., it is said (5th Ed., 1919, p. 196):

> Malt liquors, when taken in moderate quantities, seem to aid digestion, increase the appetite and stimulate gastric secretion.

In *Pharmacology and Therapeutics, or the Action of Drugs,* Arthur R. Cushny, M.A., M.D., LL.D., F.R.S., Professor of Pharmacology in the University of London, Examiner of the Universities of London, Manchester,

Oxford, Cambridge, Glasgow and Leeds; formerly Professor of Materia Medica and Therapeutics in the University of Michigan says (7th Ed., 1918, p. 195):

> In chronic conditions of cachexia and loss of flesh in general and during the convalescence, alcoholic preparations are then advised simply as foods, and in these cases the ales, beers and porters are generally to be preferred to the others, provided always that the stomach is not irritated by them as they contain other food constituents and value in general to alcohol.
>
> Alcohol is of value as a mild hypnotic, a comparatively small quantity taken before retiring being even sufficient to secure quiet and refreshing sleep. Beer or spirits in water is generally used for this purpose.

In *Practical Dietetics, with Special Reference to Diet in Diseases,* W. Gilman Thompson, M.D., Professor of Medicine in Cornell University Medical College of New York City, Visiting Physician to the Presbyterian and Bellevue Hospitals, says (4th Ed., 1909, p. 272):

> When porter, ale or stout do not derange the stomach, they may be drunk advantageously by women who are weakened by prolonged suckling.

In *The Dispensatory of the United States of America,* 20th Edition, Remington and Wood, 1918, indexed under the head of "Malt Liquors", occurs the following:

> Malt—is not itself used directly in medicine, but is official as the basis of Malt Extract. From it are also prepared the so-called Malt Liquors by making an infusion (wort) of the bruised malt, adding hops and various other substances, and fermenting. Ale, Brown Stout and Porter are made by rapid fermentation at a comparatively high temperature, 23.8 degrees C. (75 degrees F), while Lager Beer is prepared by a very slow and prolonged fermentation at a low temperature.

It is not, of course, contended that the medicinal use of stout or any other malt liquor is advocated or conceded by all members of the medical fraternity. The same may also be said of vinous and spirituous liquors, which the National Prohibition Act and the Willis-Campbell Act expressly permit to be prescribed. There is great diversity of opinion with respect to the use of any form of intoxicating liquor; and this is particularly true since prohibition became a political issue in this country and elsewhere. Certain it is that there is no universal condemnation by physicians of the use of stout or other malt liquors for medicinal purposes, as counsel for the appellees have intimated in their brief. The contrary position is maintained by many eminent writers of high authority.

IV.

The Government's answer to appellant's claim under the Fifth Amendment is not convincing.

It is gravely asserted by counsel for appellees (p. 22) that Congress was moved to pass the Willis-Campbell Act upon the representation "that if malt liquors were permitted as a medicine it would be impossible to enforce prohibition."

The evident meaning is that while rigid regulations and an efficient body of enforcement officers would easily prevent vinous and spirituous liquors, intended for medicinal use, from getting into illegitimate channels, the Government would be powerless similarly to police stout and other malt liquors. This can only be upon the theory that the less the alcoholic content and the conse-

quent greater bulk and weight of a contraband package, the more difficult the task of the guardians of the law in discovering it, apprehending it, and retiring it from circulation. On this theory—to take an illustration from the daily police records, a pint flask of high-proof spirits, obtained for medicinal purposes and carefully concealed in a hip pocket, and intended for illegal and surreptitious use at some restaurant or elsewhere, could be easily detected by the enforcement officers and the culprit promptly punished; but that a case of stout or other malt liquors, consisting of twelve quart bottles and containing an equal amount of alcohol, issued for medicinal purposes, could be carried on the person or otherwise transported, and illegally used for beverage purposes, and the discovery and punishment of the culprit would present a problem of such insuperable difficulty that prohibition must totally fail unless the use of all malt liquors for medicinal purposes be absolutely prohibited.

Every one knows that the contrary is true. The public press is filled with accounts of violations of the National Prohibition Act. It is well known that smugglers, bootleggers and other violators of the law confine their activities to vinous and spirituous liquors. The police records and reports of prohibition enforcement officers will be searched in vain for any instance where stout has been imported, manufactured, sold, or transported, for either beverage or non-beverage purposes, in violation of law. The same is largely true of all malt liquors. If stout or other malt liquors are not now the subject of illegal sale for beverage purposes, to any considerable extent, how is it conceivable that their use for medicinal purposes, if that were permitted under the rigid safeguards of the law, would so enormously increase their use for beverage purposes as to defeat the

enforcement of prohibition? The position of the Government seems to be that although the law which prohibits the sale of stout has been strictly enforced, nevertheless a permitted sale for medicinal purposes would create and stimulate a new demand for beverage use not previously existing, or new opportunities for evading the law, so that it "would be impossible to enforce prohibition."

It is further said by counsel for appellees (p. 22) that "From the large number of breweries which had filed applications for permits to manufacture malt liquors it was apparent that their product would be forced into illegitimate channels." This, of course, refers to domestic beer, and not to imported stout; but, even so, how can the conclusion follow from the premise, except upon the assumption that physicians to whom the prohibition enforcement officers, in their discretion, should entrust permits to prescribe intoxicating liquors, and the enforcement officers themselves, would wilfully and corruptly violate their duties? Even upon this assumption, why are they likely to be more corrupt in the case of malt liquors than in the case of vinous and spirituous liquors?

Due process of law guarantees to every one a certain minimum of protection; a freedom from the arbitrary exercise of the powers of government, and, in general, the enjoyment of the "rudiments of fair play." This guaranty, we respectfully submit, is violated in the present case, in that the complainant, and others in its unfortunate predicament, have been singled out from all other dealers in intoxicating liquors for medicinal purposes, and subjected to arbitrary and unreasonable restrictions. All intoxicating liquors for medicinal purposes should, in a spirit of fair play, be given the same treatment, unless there are some real and substantial

grounds for believing that the enforcement problem presents insuperable difficulties with respect to malt liquors but not with respect to vinous and spirituous liquors. But it is apparent to any one that the enforcement problem with respect to malt liquors is vastly more simple than with respect to vinous and spirituous liquors. Yet the Willis-Campbell Act is based upon an assumption precisely to the contrary; and in that fact lies the unlawful discrimination of which the appellant complains.

With respect to the claim of appellant that it was entitled to compensation for the loss which it would sustain to its stock of stout on hand when the Willis-Campbell Act was passed and became effective, counsel for appellees state (p. 24) that this claim has been disposed of contrary to our contention, citing the *Mugler, Hamilton* and *Ruppert* cases, decided by this Court.

These cases, however, do not touch the precise question in issue. The Willis-Campbell Act became effective immediately, without any period of grace, and prohibited that which the National Prohibition Act had expressly permitted. The stock of stout then on hand could not be sold in this country or transported for export and sale elsewhere. It was virtually confiscated by legislative fiat. This Court has not decided that this may lawfully be done.

There were periods of grace in each of the cases cited by appellees. In the *Mugler* case, the period extended from November 2, 1880, when the constitutional amendment was adopted, beyond February 19, 1881, when the enforcement act was passed, which did not take effect until May 1, 1881. In the *Hamilton* case, there was, as stated by the court in its opinion, a period of seven months and nine days from the passage of the War-time Prohibition Act within which the owner could dispose of his stocks, free from any restrictions imposed

by the Federal Government. In the *Ruppert* case, the stock of beer on hand had not been manufactured under lawful authority. The court said:

> The statement of the plaintiff that the 2.75 per cent beer on hand was manufactured under permission of the President is wholly unfounded.

The same may be said of the recent case of *Corneli* v. *Moore,* 257 U. S. 491, which referred only to beverage liquor. There ample opportunity was afforded from the ratification of the Eighteenth Amendment, in January, 1919, to the effective date of the Volstead Act, a year later. In all of these cases, there was a period of grace or adjustment within which the owner of the intoxicating liquor affected could lawfully dispose of it, or otherwise minimize his loss.

But the Willis-Campbell Act afforded no such opportunity to dispose of stocks on hand at its effective date, or to reduce the loss which was inevitable; and in that fact lies our claim that with respect to the stock of stout on hand, the Act operated to deny to appellant due process of law. The precise question was passed upon in *Falstaff* v. *Allen,* 278 Fed. 643, where the court held that the Willis-Campbell Act was a denial of due process of law with respect to stocks of malt liquors lawfully on hand at its effective date. The court there said (p. 649):

> When this matter was first presented, and this bill filed, complainant, as it was averred, had on hand a large quantity of beer, which it had made pursuant to permit regularly issued to it. This permit had been issued under the opinion of the Attorney General of the United States, who construed the then existing law as allowing the making and sale of beer for medicinal purposes. Certain of the defendants, upon the passage of the

Act of November 23, 1921 (which outlawed a large quantity of beer thus made and held by complainant), were threatening to destroy the same unless complainant dealcoholized it at once. In either contingency complainant (which had done nothing except to honestly and fairly follow the law as interpreted by the highest non-judicial legal authority in the United States) would have been subjected to loss of its property. To prevent such loss, which, in my view, *would have been tantamount to taking the property of complainant without due process of law*, a temporary restraining order pending further hearing was granted to afford opportunity to complainant to avoid, if possible, and if so advised, the contingent loss. It is scarcely conceivable that Congress would have passed the amendment of November 23, 1921, without providing certain days of grace before the act went into effect, if it had been advised of the situation existing. Be this as may be, it seemed only fair to temporarily stay the action threatened until the case could be presented on its merits, and this was done.

When the Eighteenth Amendment was ratified, the appellant was fairly justified in believing that Congress, in its enforcement legislation, would be limited to the prohibition of intoxicating liquors for beverage purposes, and that the right to sell its stout for medicinal purposes would lawfully continue under State legislation. This belief found confirmation in the National Prohibition Act, which was accepted by all as a declaration by Congress of a new and permanent public policy. This Act made express provision for the sale of medicinal liquors, and appellant was fairly justified in assuming and believing that this announced public policy would continue, or that, if discontinued, some reasonable time would be afforded it within which an adjustment could be made to new conditions without serious loss.

Under these circumstances, the passage of the Willis-Campbell Act, taking effect immediately, and making no provision for the disposition of stocks then lawfully on hand, was, as stated by the court in the case cited above, "tantamount to taking the property of complainant without due process of law."

Respectfully submitted,

SAMUEL W. MOORE,
MARCUS L. BELL
Solicitors for Appellant.

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